80-706

NO._____

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

INDUSTRIAL TILE, INC., a corporation,

Petitioners,

v.

JOHN STEWART AND UNITED STATES FIDELITY & GUARANTY COMPANY, a corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

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QUESTIONS PRESENTED

1. Whether a state court may allow in evidence in a third party personal injury suit as a declaration against interest, an OSHA citation, fine, a failure to contest the fine and a voluntary payment of the fine by the cited party in light of the Federal Statute which states:

> "(4) Nothing in this chapter [OSHA] shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment" 29 U.S.C. §653 (4).

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29 U.S.C. §659 8

The petitioner Industrial Tile, Inc., a corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Alabama entered in this proceeding on August 22, 1980.

I

OPINION BELOW

The opinion of the Supreme Court of the State of Alabama is entitled "Industrial Tile, Inc., a coroporation, v. John Stewart and United States Fidelity & Guaranty Company, a corp., 78-462; Courtaulds North America, Inc. v. Industrial Tile, Inc., a corporation, 78-401" and presently appears in 14 Ala. Bar Reporter 2199 and appears in the Appendix hereto. The case being tried to a jury, no written opinion was rendered by the Circuit Court of Mobile County, Alabama.

II

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on August 22, 1980. A timely application for rehearing was denied on September 26, 1980, and this petition for certiorari was filed within 90 days of that date. The court's jurisdiction is invoked under 28 U.S.C. §1257(3).

III

STATUTES INVOLVED

This case involves Public Law 91-956 § 4, 29 U.S.C. § 653 (4) commonly known as the Occupational Safety and Health Act of 1970. (OSHA)

IV

QUESTIONS PRESENTED

1. Whether a state court may allow in evidence in a third party personal injury suit as a declaration against interest, an OSHA citation, fine, a failure to contest the fine and a voluntary payment of the fine by the cited party in light of the Federal Statute which states:

> "(4) Nothing in this chapter [OSHA] shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment" 29 U.S.C. § 653 (4)

V

STATEMENT OF THE CASE

Plaintiff below, John Stewart, was employed at the time of his accident as an ironworker for J&J Construction &

Maintenance Contractors (J&J). J&J had been engaged by Courtaulds North America, Inc. (Courtaulds) to renovate an area of its Lemoyne, Alabama, Plant. Stewart was injured when he attempted to aid an employee of another independent contractor, Industrial Tile, Inc. (Industrial Tile), petitioner herein. Industrial Tile's employee was electrocuted when a cherry picker (a mobile hydraulic crane) operated by Industrial employees came in contact with a 7200 volt wire which had been installed in 1971 as a temporary measure by Courtaulds, which owns and maintains its own electrical system, including overhead transmission lines. The transmission wire had been partially disconnected when no longer needed, but the current was never cut off. The wire draped an entrance to an unpaved storage yard within the Courtaulds compound, where employees of all independent contractors performed work.

Stewart filed this action against Courtaulds, Industrial Tile, and others. He alleged that he was injured as a result of the negligence of Courtaulds in installing and maintaining high voltage lines in a negligent manner on its premises and having uninsulated wire in a place where it might reasonably be expected that persons or machinery would come into contact with them. He also alleged that Industrial Tile negligently operated a crane so as to cause it to come into contact with the power lines installed and maintained by Courtaulds.

The case against Courtaulds and Industrial Tile went to the jury, which returned a verdict in favor of the plaintiff, Stewart, for $375,000.00. Courtaulds and Industrial Tile filed Motions for Judgment Notwithstanding the Verdict or, in the Alternative, New Trials. These were denied, and Industrial Tile filed a notice of appeal of the plaintiff's verdict.

Courtaulds did not appeal from the judgment entered in favor of the plaintiff, Stewart, but did appeal from the judgment entered in favor of Industrial Tile and against it on its crossclaims. By way of cross-claim, Courtaulds claimed indemnity for any judgment recovered against it by Stewart.

Because of the death of Industrial Tile's employee Myers, OSHA undertook an investigation and filed a citation against Myers' employer Industrial Tile, Inc. After the citation was issued the local OSHA office issued a fine to Industrial Tile, Inc. notifying Industrial Tile that if it wished to contest the fine that such notice should be filed within 15 days of the issuance of the fine. Industrial Tile did not contest the fine and voluntarily paid the fine. The citation involved operating a crane within a 10 ft distance of an energized electrical wire.

At the trial of the case, upon the cross-examination of the first witness, the Pesident of Industrial Tile, attorneys for Courtaulds asked:

> "Isn't it a fact that Industrial Tile and Industrial Tile alone was fined by OSHA for violation of this very standard?"

Industrial Tile objected and moved to strike the question and moved for mistrial. After length discussion out of the presence of the jury this was denied. Upon the jury returning the counsel for Courtaulds continued cross-examination of Mr. Savell, the President of Industrial Tile:

> "Question: Now, Mr. Savell, OSHA people cited Industrial Tile the day of this accident for violation of the 10 ft rule, isn't that correct?"

Again, Industrial Tile renewed the objection to the question of counsel on the grounds it was inadmissible, incompetent, irrelevant and immaterial as to any matters that OSHA undertook in administrative proceedings, would be preju-

dicial and again renewed its request for a mistrial. At that point the court overruled and denied the motions and directed the witness to answer the question. He then answered that his company was fined and did not contest the fine.

The trial judge instructed the jury:

> "This is not the ultimate decision for you to decide, but you consider this in connection with all the facts that you hear in this case."

The Supreme Court of Alabama, recognizing its earlier case wherein it held that a plaintiff did not have a private civil remedy because of a violation of the Occupational Safety and Health Act of 1970 or the regulations thereunder went on to hold, however, that it was not error to admit the regulations under the authority of earlier cases. The court then went on to hold:

> "Clearly, the fact that Industrial Tile had been cited by OSHA for violating the standards, and the fact that Industrial Tile had paid the fine, are relevant to the question of whether it violated the standard of care applicable to its conduct. . . .It seems to us that evidence that Industrial Tile paid the fine without objection was properly admitted in evidence as a declaration against interest."

Industrial Tile's application for rehearing of the decision of the Alabama Supreme Court was denied on September 26, 1980.

VI

REASONS FOR GRANTING THE WRIT

1. The Federal Occupational Safety and Health Act of 1970 prohibits its use so that it would "affect" the "common law" or "liabilities" of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment, and the OSHA citation, fine, failure to contest the fine and voluntary payment of the fine being admitted into evidence as a declaration against interest by a state court violates the spirit and the letter of the Federal Statute.

The following is contained in the Federal Occupational Safety and Health Act of 1970:

> "Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment." 29 U.S.C. 653 (b)(4)

The sole issue raised by Industrial Tile in the appeal of the plaintiff's verdict was the question of whether the admission into evidence by the trial court of the fact that an OSHA representative issued a citation and a later fine, which was not contested and voluntarily paid, could be allowed into evidence as a declaration against interest in a later third-party liability suit. While John Stewart was not an employee of Industrial Tile, the citation and fine involved were placed against Industrial Tile as a result of the death of one of its own employees. The plaintiff Stewart was shocked when he came into contact with Industrial Tile's crane while investi-

gating the injuries to Industrial Tile's employee.

The Alabama Supreme Court has recognized in *Knight v. Burns, Kirkley & Williams Construction, Inc.*, 331 So. 2d 651 (Ala. 1976) that a plaintiff does not have a private civil remedy because of a violation of the Occupational Safety & Health Act of 1970 or regulations issued thereunder. In that same opinion, the court held that OSHA regulations were admissible for a jury to consider in determining whether a defendant was negligent or not. It also held that the regulations might be admissible for a jury to consider in determining the standard of care the defendant should have followed. In the case and the opinion now before this Court, the Alabama Supreme Court restated and reaffirmed its holding in *Knight v. Burns, Kirkley & Williams Construction, Inc.*, supra. However, the Alabama Supreme Court went on to extend the reach of OSHA by holding that a failure to contest a fine issued under OSHA was admissible into evidence in a third-party personal injury suit as a declaration against interest. In support of this position the Alabama Supreme Court cited the cases of *Motley v. Page*, 250 Ala. 265, 34 So. 2d 201 (1948), and *Ritter v. Griswold*, 2 Ala. App. 618, 56 So. 860 (1911). These two cases involve a question of whether a "plea of guilty" in a criminal matter for an offense can be admitted in a civil action for the same offense as a declaration against interest. In *Ritter v. Griswold*, supra, the Alabama court refused to allow evidence of a "plea" where it could not be shown the "plea" in the criminal action was for assault and battery where in fact that was the cause of action being pursued in the civil action. In *Motley v. Page*, the Supreme Court of Alabama allowed in a "plea of guilty" where it was shown that the criminal offense was one and the same as that charged in the "assault and battery" complaint in the civil

action. Alabama has never held that the mere failure "to contest" as opposed to a "plea of guilty" is admissible as a declaration against interest. Prior to this decision the Alabama Supreme Court had never held that any Federal administrative procedure could be used as a declaration against interest in a later civil suit brought in the state court. Additionally, the Alabama Legislature has enacted a standard that is less restrictive than the OSHA standard. The Alabama Legislature allows operation within *6 ft* of an energized line. The OSHA regulation restricts use of a crane to within *10 ft* of energized wires. See Code of Alabama 1975, 37-8-52 and 37-8-53.

The administrative citation and fining mechanism set up under OSHA is found in 29 U.S.C. § 658 et seq. Section 659 provides:

> "... He shall ... notify the employer by certified mail of the penalty, if any, proposed to be assessed under § 666 of this title and that the employer has 15 working days within which to notify the Secretary that he wishes to *contest* the citation or proposed assessment of penalty." (emphasis supplied)

Thus, the imposition of a civil penalty such as was levied against Industrial Tile does not involve a "plea of guilty" as was discussed in the above Alabama Supreme Court cases cited as authority. In fact, a failure "to contest" is much more like a "plea of nolo contendere". The Alabama Supreme Court recognizes the general rule concerning "pleas of nolo contendere" and in *Fidelity-Phenix Fire Insurance Company v. Murphy,* 231 Ala. 680, 166 So. 604 (1936) excluded evidence of such a plea and held:

> "The effect of the general authorities is that such plea has no effect beyond the particular case, and cannot be used against the defendant as an admission in any civil suit for the same act."

While this case was cited to the Supreme Court, it did not choose to apply it. See also *Rule 410 Federal Rules of Evidence.*

Several courts have held that Congress did not intend OSHA to create a new private cause of action but intended private rights to be "unaffected". While the Alabama Supreme Court seems to state that it recognizes that a cause of action cannot be created under OSHA, it also now holds the mere introduction into evidence of a citation, fine, failure to contest the fine and voluntary payment of a fine do not really "affect" the rights of employers but are only "declarations against interest". In *Jeter v. St. Regis Paper Company,* 507 F.2d 973 (5th Cir. 1975 Miss.) the United States Court of Appeals, Fifth Circuit discussed whether a cause of action could be created under OSHA. The court held:

> "Assuming without deciding that St. Regis may have violated the requirements of OSHA and the regulations promulgated thereunder by the Secretary of Labor, we affirm the trial court's charge and hold that no cause of action for such violations can be implied under OSHA to run in favor of a person who was not an employee of the violator against whom recovery is sought." 507 F.2d at 976

* * *

> It seems clear that Congress did not intend OSHA to create a new private cause of action, but, on the contrary, intended private rights to be unaffected thereby.
>
> The provisions for enforcement of OSHA and the regulations promulgated thereunder are sufficiently comprehensive to make such a private right of action unnecessary to effectuate the congressional policy underpinning the substantive provisions of the statute. See *Martinez v. Behring's Bearings Service, Inc.,* 501

F.2d 104 (5th Cir. 1974) cf. *Breitweiser v. KMS Industries, Inc.*, 467 F.2d 1391, 1394 (5th Cir. 1972), cert. denied, 410 U.S. 969, 93 S. Ct. 1445, 35 L.Ed. 2d 705 (1973).

We have been unable to find a single case wherein a court has found such a private right of action created by OSHA. Although the results are not yet conclusive as to the litigation of private claims spawned by this relatively new Act, the courts so far has been unanimous in their rejection of contentions similar to the one made by Jeter. This court has previously rejected any private right by an employee against the executive officers of the employer. *Skidmore v. Travelers Insurance Company,* 356 F. Supp. 670 (E.D. La, aff'd, 483 F.2d 67 (5th Cir. 1973). The Fourth Circuit has refused to imply an action against the employer itself, where state workmen's compensation was the exclusive remedy of the injured party. *Byrd v. Fieldcrest Mills, Inc.*, 496 F.2d 1323 (4th Cir. 1974). The Sixth Circuit has refused an employee — against - employer action, as well as an action by the employee against the supervising engineer, who was not his employer. *Russell v. Bartley,* 494 F.2d 334 (6th Cir. 1974). See also *Hare v. Federal Compress & Warehouse Company,* 359 F. Supp., 214 (N.D. Miss. 1973); *Dekle v. Todd,* 132 Ga. App. 156, 207 S.E. 2d 654 (1974).

Although the facts here do not call upon us to decide definitively whether OSHA may create a private right of action by an employee against his employer, we perceive no base upon which to posit a claim on behalf of Jeter, a non-employee, against St. Regis. St. Regis owes no duty to Jeter under OSHA. There being no duty, there can be no breach. The district court was correct in not submitting this theory of action to the jury."

In *Russell v. Bartley,* supra, the 6th Circuit stated as follows:

> "OSHA's declared purpose is 'to assure so far as is possible every working man and woman in the Nation safe and healthful working conditions . . . 29 U.S.C. § 651 (b). To this end the Act specifies safety requirements for employers engaged in interstate business and emphasizes the duty of the employer to provide safe working conditions. Enforcement of that duty is by criminal sanction, civil penalty and the right to injunctive relief. However, nowhere in the statute or in the record of the debate on the Act in Congress is there any mention of a private civil remedy against anyone for damages suffered by an employee because of the violation of the Act.
>
> * * *
>
> Defendant-appellee Bell was not appellant's employer. 'From the very wording of the statute and all of the legislative reports it is clear that OSHA applies only to 'employers'." *Skidmore,* supra, 356 F. Supp. at 672."

There is no question that the admission into evidence of the administrative proceedings under OSHA has affected the common law and the liabilities of the employer Industrial Tile, Inc. The Alabama Supreme Court has expanded and extended its law of evidence to now include the administrative enforcement remedies under OSHA to expand and extend the common law and the liabilities of employers. It is specifically prohibited from doing so by an Act of the Congress of the United States. And while the Alabama Supreme Court states that it has not created a cause of action for violation of OSHA, it has allowed the liabilities of employers to become affected by independent, nonjudicial, administrative enforcement proceedings. It has in effect enlarged the substantive law of the State of Alabama as it

affects the liabilities of employers. See also *National Marine Services, Inc. v. Gulf Oil Company* (D.C. La. 1977) 433 F. Supp. 913, *Davis v. Portland General Electric,* 593 P.2d 1135, 286 Or. 195 (1979), *Fawvor v. Texaco Inc.,* 387 F. Supp. 626, remanded on other grounds 546 F.2d 636 (D.C. Tex. 1975), *Kelley v. Howard S. Wright Construction Company,* 582 P.2d 500, 90 Wash. 323 (1978), *Otto v. Specialties Inc.,* 386 F. Supp. 1240 (D.C. Miss. 1974), *Dunn v. Brimer,* 259 Ark. 855, 537 S.W. 2d 164 (1976), *Buhler v. Mariott Hotels, Inc.,* 390 F. Supp. 999 (D.C. La. 1974), *Burrell v. Rodgers,* 441 F. Supp. 275 (D.C. Okla. 1977), *Gallardo v. Westfal-Larsen & Company,* a/s 435 F. Supp. 484 (D.C. Cal. 1977), *Jackson v. New Jersey Mfrs. Ins. Co.,* 166 N.J. super, 448, 400 A.2d 81 (1979) cf. *Koll v. Manatt's Transp. Company,* 253 N.W. 2d 265 (Iowa 1977)

There are practical reasons that the Congress of the United States would not want to increase the liabilities of employers under the Act. One reason as pointed out by several of the courts above is that there is sufficient administrative machinery for insuring the overall purposes of the Act. The second is that by allowing the regulations or evidence of violation of the regulations, such as citations, fines, failure to protest fines and voluntary payment of fines to be used against the employer the whole administrative machinery will become log-jammed with a "contest" in every case. If the decision of the Alabama Supreme Court is allowed to stand then the inevitable result will require employers to contest every citation or fine rather than expose itself to large personal injury judgments such as has been experienced in this case. The express declaration of Congress in Title 29 U.S.C. § 653 (b) (4) is in effect similar to the proviso contained in the Clayton Anti-Trust Act found in 15

U.S.C. § 16 (a). That Section holds that a final judgment or decree can have the effect of prima facie evidence but that a consent judgment or decree entered before any testimony cannot. This Section states as follows:

> "Section 16 (a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the anti-trust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant and any action or proceeding brought by any other party against such defendant under said laws or by the United States under Section 15 (a) of this Title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* that this Section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under Section 15 (a) of this Title." (emphasis original)

As to the admissibility of such a consent judgment in a state court action at least one state court has held that such are not admissible. In *Commercial Communications Inc. v. Public Utilities Commission 1958,* 327 P.2d 513, 50 C.2d 512 appeal dismissed, 79 S. Ct. 722, 359 U.S. 119, 3 L.Ed. 2d 674, cert. den. appeal dismissed 79 S. Ct. 896, 359 U.S. 341, 3 L.Ed. 2d 927 held as follows:

> "In January 1956 the Department of Justice brought a proceeding under the Sherman Act in the United States District Court in New Jersey against Western Electric Company Inc. and American Telephone & Telegraph Company, by consent of the parties and without trial of the issues a consent decree was entered. Under Federal Anti-trust laws where no trial is had and no testimony taken, a consent decree is not evidence of or admission of any of the charges contained in the complaint."

Several courts have discussed the intention of the Con-

gress of the United States enacting this proviso. In *Commonwealth Edison Company v. Allis D. Chalmers Manufacturing Company,* 323 F.2d 412 (7th Cir. 1963) cert. den. 376 U.S. 939, 84 S. Ct. 794, 11 L.Ed. 2d 659 (1964) the 7th Cir. held as follows:

> "On the other hand, by enacting the exclusionary proviso, Congress sought to aid anti-trust enforcement by encouraging defendants to capitulate, at a savings of time and expense to the government."

Certainly the overall scheme of the Federal Statute and the intent of enacting OSHA would be defeated by allowing the administrative procedures under the Act to be used as admissions of liability in state court or Federal diversity suits brought by injured persons.

2. By allowing into evidence OSHA administrative proceedings there will be affected not only Industrial Tile and the parties to the present suit but thousands of other employers both in the State of Alabama and other states involved in interstate commerce where the case below may become persuasive authority.

At the present time approximately only one-fourth of non-follow-up inspections with citations are contested.[1]

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[1]Information taken from OSHA Report 1 CAR. Covering October '78 - October '79. For 46,237 non-follow-up inspections conducted by OSHA in Federal program states in fiscal year 1979 approximately 65% resulted in one or more citations. During this period 22% of inspections with citations were contested. The fiscal year of the report is October 1978 through September 1979 and the above figures reflect an offset period because of late reporting and covers September '78 through August '79. Approximately 2500 of the inspection citations were originated because of personal injury.

VII

CONCLUSION

The use by a state court of the administrative machinery and particularly the citation and fining capacity under OSHA to be used against an employer as admission against interest violates the policy and scheme of the Federal Statute which explicitly states that nothing in OSHA is to "... affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment."

WHEREFORE, it is respectfully requested that a writ of certiorari issue to the Supreme Court of the State of Alabama to review the opinion and ruling of that court and to order a reversal and remand of the trial of the case between Stewart and Industrial Tile to be conducted free from the influence and affect of the Occupational Safety and Health Act of 1970.

Respectfully submitted,

By: _____
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APPENDIX A

THE STATE OF ALABAMA ----- JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPECIAL TERM, 1980

Industrial Tile, Inc., a corp.

78-462 v.

John Stewart and United States Fidelity and Guaranty Company, a corp.

Courtaulds North America, Inc.

78-401 v.

Industrial Tile, Inc., a corp.

Appeals from Mobile Circuit Court

SHORES, JUSTICE.

Plaintiff, John Stewart, was employed at the time of his accident as an iron worker for J & J Construction and Maintenance Contractors (J & J). J & J had been engaged by Courtaulds North America, Inc. (Courtaulds) to renovate an area of its LeMoyne, Alabama, plant. Stewart was injured when he attempted to aid an employee of another independent contractor, Industrial Tile, Inc. (Industrial Tile); the other employee was electrocuted when a cherry picker (a mobile hydraulic crane) operated by Industrial Tile employees came in contact with a 7200-volt wire which had been installed in 1971 as a temporary measure by Courtaulds, which owns and maintans its own electrical system, including overhead transmission lines. The transmission wire had been partially disconnected when no longer needed,

but the current was never cut off. The wire draped an entrance to an unpaved storage yard within the Courtaulds compound, where employees of all independent contractors performed work.

Stewart filed this action against Courtaulds, Industrial Tile, and others. He alleged that he was injured as a result of the negligence of Courtaulds in installing and maintaining high voltage lines in a negligent manner on its premises and having uninsulated wires in a place where it might reasonably be expected that persons or machinery would come into contact with them. He also alleged that Industrial Tile negligently operated a crane so as to cause it to come into contact with the power lines installed and maintained by Courtaulds.

The case against Courtaulds and Industrial Tile went to the jury, which returned a verdict in favor of plaintiff, Stewart, for $375,000. Courtaulds and Industrial Tile filed motions for judgment notwithstanding the verdict or, in the alternative, new trials. These were denied, and Industrial Tile filed notice of appeal.

Courtaulds did not appeal from the judgment entered in favor of plaintiff, Stewart, but did appeal from the judgment entered in favor of Industrial Tile and against it on its cross-claims. By way of cross-claim, Courtaulds claims indemnity for any judgment recovered against it by Stewart. We address each of the appeals separately.

I.

Industrial Tile, Inc., a corp. v. John Stewart and United States Fidelity and Guaranty Company, a corp.

The sole issue raised on appeal by Industrial Tile is whether the trial court erred to reversal in admitting into

evidence the fact that Industrial Tile had been fined for violating OSHA regulations.

Plaintiff charged that Industrial Tile had negligently operated a mobile hydraulic crane in such a manner as to allow the crane to come in contact with power lines maintained by Courtaulds. Counsel for Courtaulds, on cross-examination of an officer of Industrial Tile, elicited from that witness that he was familiar with the Occupational Safety and Health Act (OSHA) and its requirements that where power lines contained 50,000 volts or less, there must be a clearance of ten feet between the boom of a crane and the wire. The witness than identified a copy of the rules and regulations, which were admitted into evidence without objection. Among the regulations set out was Section 1926-550 which contains the minimum clearance requirements. The witness testified that such regulations applied to Industrial Tile. He was then asked whether Industrial Tile had been fined by OSHA for violation of a regulation. Counsel for Industrial Tile objected and moved to strike the question, contending then and now that such evidence was prejudicial and, thus, inadmissible.

The trial court heard argument from counsel for both sides and overruled the objection and, when the jury returned, advised that the regulations were admitted into evidence "not as the absolute rule for you to follow but this is a guideline of rules and regulations, one of the guidelines of the rules and regulations to be followed in the trade or business Industrial Tile is involved in."

Counsel for Courtaulds then asked the witness if Industrial Tile had been cited by OSHA on the day of the accident for violation of the ten-foot rule. Counsel for Industrial Tile renewed its objection on the ground that it was "inadmissible, incompetent, irrelevant and immaterial

as to any of these matters that OSHA undertook in administrative proceedings, would be prejudicial and again [renewed its] request for a mistrial." The court overruled the objection and denied the motion for a mistrial, instructing the jury that "this is not the ultimate decision for you to decide, but you consider this in connection with all of the facts that you hear in this case." The witness then answered that Industrial Tile had been fined by OSHA. The witness testified that Industrial Tile had an opportunity to contest the citation bud did not do so for the reason that "there wasn't much sense to it because I felt like it would be a waste of time. It was an automatic fine anyway, we did rig it to go lower."

In *Knight v. Burns, Kirkley and Williams Construction, Inc.*, 331 So. 2d 651 (Ala. 1976), this Court held that a plaintiff did not have a private civil remedy because of a violation of the Occupational Safety and Health Act of 1970 or the regulations promulgated thereunder. The Court specifically said:

> However, this does not mean that appropriate and relevant standards and safety requirements established by OSHA or accompanying regulations are completely and totally irrelevant. In the case of *City of Dothan v. Hardy*, 237 Ala. 603, 188 So. 264 (1939) this court upheld the admission into evidence of 'Safety Rules for the Installation and Maintenance of Electrical Supply and Communication Lines' from the 'Handbook of The Bureau of Standards, No 10,' for the jury to consider in determining whether a defendant was negligent or not. These safety rules were promulgated by an agency of the United States Government. Under proper circumstances Occupational Safety and Health Act provisions and regulations may be admissible for a jury to consider in determining the standard of care that a defendant should have followed, if properly introduced in accordance with the requirements of the *City of dothan v. Hardy*, supra.

Knight v. Burns, Kirkley and Williams Construction, Inc., supra, p. 654.

We hold that it was not error to admit the regulations under the rule stated in *City of Dothan,* supra. If the regulations are admissible as going to show a standard of care, then it seems only reasonable that evidence of violation of the standards would also be admissible as evidence that the defendant failed to meet the standards that it should have followed. Clearly, the fact that Industrial Tile had been cited by OSHA for violating the standards, and the fact that Industrial Tile had paid the fine, are relevant to the question of whether it violated the standard of care applicable to its conduct. There was evidence from a number of witnesses that the crane violated the ten-foot standard. It seems to us that evidence that Industrial Tile paid the fine without objection was properly admitted in evidence as a declaration against interest. *Motley v. Page,* 250 Ala. 265, 34 So. 2d 201 (1948); *Ritter v. Griswold,* 2 Ala. App. 618, 56 So. 860 (1911). We find no error to reverse, particularly in light of the admonition given the jury by the trial judge that it was not to consider the rules and regulations as an absolute, but merely as guidelines, and that they were to be considered along with all the other facts adduced in the case.

The judgment is affirmed.

II.

Courtaulds North America, Inc. v. Industrial Tile, Inc., a corp.

In response to plaintiff Stewart's suit against Courtaulds and Industrial Tile, and others, Courtaulds filed an answer and also filed cross-claims against Industrial Tile seeking

indemnity on several theories. Industrial Tile moved to dismiss the cross-claims, but this motion was not ruled upon until after the trial was had and all the parties had rested. At the end of the case, the trial court entered its order granting Industrial's motion to dismiss.

The case was submitted to the jury which returned a verdict for $375,000 in favor of plaintiff Stewart and against all defendants. After the court denied its motions to set aside its order dismissing the cross-claims, Courtaulds appealed.

On appeal, Courtaulds asserts that the trial court was wrong in granting Industrial's motion to dismiss the cross-claims.

It asserts that the trial court erred in granting the motion because Courtaulds refiled the cross-claims after the motion to dismiss was filed and no new motion to dismiss was again filed. We are unpersuaded by this argument. Courtaulds admits that the refiled cross-claims were substantially identical to the ones to which the motion to dismiss was originally addressed. We see no need for the refiling of a motion to dismiss not theretofore ruled upon where the pleadings to which it was originally addressed were not substantially altered by the refiling.

Furthermore, although we are urged to test the trial court's correctness in granting Industrial's motion to dismiss the cross-claims as a 12(b) (6) ARCP motion, it should not be viewed as a usual motion to dismiss case. This motion to dismiss was not ruled upon until all of the evidence was in. Therefore, we must test the trial court's action in view of what was before it at the time and, thus viewed, it lends itself to treating the action of the trial court as if it had directed a verdict in favor of Industrial Tile on Courtaulds' cross-claims. This is true because all of the evidence adduced by all parties to the litigation was in at the time the motion was granted.

Tested in that fashion, then, we look to each of the theories of liability and the evidence in the record as it relates to each theory of liability asserted in the cross-claims.

Tested in that fashion, we agree with Courtaulds in its contention that the trial court erred in granting Industrial Tile's motion to dismiss Courtaulds' cross-claims based upon the written indemnity contract.

The claims founded on the indemnity contract alleged in part that Industrial Tile was performing certain work for Courtaulds on Courtaulds' premises, that this work was being performed pursuant to a written contract; that the contract was in full force and effect at all pertinent times; that the contract contained a provision requiring Industrial Tile to indemnify and hold harmless Courtaulds from any damages on account of bodily injury occurring in connection with the work to be done by Industrial Tile.

The specific provision for indemnity appears in the contact as follows:

> ARTICLE II - Indemnification. - The Contractor [Industrial Tile] shall be solely responsible to indemnify and hold harmless the Owner [Courtaulds], its agents, servants and employees, from and against any and all claims, losses, suits, damages, judgments, expenses, costs and charges of every kind and nature, whether direct or indirect, on account of or by reasons of, bodily injuries (including death) to any person or persons, including, but not limited to its agents, servants and employees or other of the Owner, Contractor or any subcontractor and injury to or destruction of property (including the loss of use thereof) of the Owner, or others arising out of or occurring in connection with the performance of the work to be done pursuant to the contract and whether or not caused by or contributed to, or alleged to have been caused by or contributed to, by the active, passive, affirmative, sole or concurrent

> negligence or breach of any statutory duty, whether non-delegable or otherwise on the part of the owner or its agents, servants or employees, or liability therefore imputed as a matter of law to the owner and/or its agents, servants or employees or from the failure of or any condition in materials or parts or faulty workmanship furnished by the Owner, Contractor or any Sub-Contractor and/or their respective agents, servants or employees pursuant to the Contract.

The question presented is whether or not this provision of the contract is enforceable. The Court has, for many years, held that as between private parties, indemnity contracts are enforceable if the contract clearly indicates an intention to indemnify against the consequences of the indemnitee's negligence, and such provision was clearly understood by the indemnitor, and there is not shown to be evidence of a disproportionate bargaining position in favor of the indemnitee. *J. E. Eley v. Brunner-Lay Southern Corp., Inc.*, 289 Ala. 120, 266 So. 2d 276 (1972); *Georgia, Florida, Alabama Transportation Co., Inc. v. Deaton, Inc.*, 293 Ala. 371, 304 So. 2d 168 (1974); *Armi v. Huckabee*, 266 Ala. 91, 94 So. 2d 380 (1957); *Batson-Cook Co. v. Industrial Steel Erectors*, 257 F.2d 410 (5th Cir. 1958); *U.S. Fidelity & Guaranty Co. v. Mason & Dulion Co., Inc.*, 274 Ala. 202, 145 So. 2d 711 (1962); *Cairnes v. Hillman Drug Co.*, 214 Ala. 545, 108 So. 362 (1926); *Spangler v. Hobson*, 212 Ala. 105, 101 So. 828 (1924); *Louisville & N.R. Co. v. Cullman Warehouse, Inc.*, 226 Ala. 493, 147 So. 421 (1933).

In *J. E. Eley v. Brunner-Lay Southern Corp., Inc.*, supra, the Court summarized the rule followed in this state as follows:

> We think that our cases hold that the intention to indemnify the negligence of the indemnitee must clearly

appear from the wording of the instrument, but when that intention is clear, the indemnity provisions will be read and construed so as to give them the meaning the parties have expressed. We think that in the instant case the intention to indemnify was clearly expressed, it was not ambiguous and the indemnity provisions are effective as between the parties.

In *Campbell Piping Contractors, Inc. v. Hess Pipline Co.*, 342 So. 2d 766 (Ala. 1977), the Court said:

> We have repeatedly held that such provisions must be construed in favor of the indemnitor in instances where the indemnity is not contracted for from an insurance company engaged in the business of writing, for consideration, such coverage, and that such provisions must succinctly and clearly indicate that the indemnitor is required to indemnify the indemnitee against loss occasioned by his own negligence. U.S.F. & G. v. Mason & Dulion Co., 274 Ala. 202, 145 So. 2d 711 (1962).

The Court's insistence that such provisions be unambiguous and unequivocal arises from its concern that, generally speaking, one should not be able to contract against the consequences of his own wrong. However, as stated in 41 Am. Jur. 2d, *Indemnity*, § 9 (1968), the general rule seems to be:

> Broadly speaking, a promise of indemnity for the performance of an act not illegal, immoral, or against public policy is valid. Thus, indemnity against loss on account of a business transaction is proper. And, although there is some earlier authority to the contrary, it is now the prevailing rule that a contract may validly provide for the indemnification of one against, or relieve him from liability for, his own future acts of negligence provided the indemnity against such negligence is made unequivocally clear in the contract.

Section 15:

> A contract of indemnity purporting or claimed to relieve one from the consequences of his failure to exercise ordinary care must be strictly construed. Accordingly, it is frequently stated as the general rule that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from his own negligent acts unless such intention is expressed in clear and unequivocal terms, or unless no other meaning can be ascribed to it.

Alabama has generally followed these general rules when construing contracts between private parties, as distinguished from corporations performing a public service. *American District Telegraph Company of Alabama v. Roberts & Son, Inc.*, 219 Ala. 595, 122 So. 837 (1929).

Industrial Tile argues that alabama, in 1978, in *Alabama Great Southern Railroad Co. v. Sumter Plywood Corp.*, 359 So. 2d 1140 (Ala. 1978), rejected the general rule and now follows the rule that, as between private parties, any contract which permits the indemnification of the indemnitee against his own wrongs is void as against public policy. We agree that there is language in the opinion which supports Industrial Tile's contentions. However, after carefully reviewing all of the authority in this state, we are compelled to conclude that, if the parties knowingly, evenhandedly, and for valid consideration, intelligently enter into an agreement whereby one party agrees to indemnify the other, including indemnity against the indemnitee's own wrongs, if expressed in clear and unequivocal language, then such agreements will be upheld. To the extent that *Alabama Great Southern Railroad Co. v. Sumter Plywood Corp.*, supra, holds otherwise, it is hereby modified.

Based upon the record before us, we cannot say as a matter of law that the agreement involved in this case fails to meet

that test. Therefore, we reverse the trial court, and remand the claim asserted by Courtaulds in its cross-claims against Industrial Tile, based upon the written indemnity provision, for reconsideration in light of this opinion.

CASE NO. 78-462 AFFIRMED.

CASE NO. 78-401 REVERSED AND REMANDED.

Torbert, C. J., and Maddox, Almon, and Beatty, JJ., concur.

Faulkner, Jones, and Embry, JJ., concur in part and dissent in part.

JONES, JUSTICE (Concurring in Part I and dissenting in Part II):

I concur in Part I of the opinion, affirming the judgment below on the evidentiary question. I dissent as to Part II, reversing the judgment on the indemnity contract issue.

While I agree with the majority's statement of our case law's evolvement of the general rule, I would add that its application has not produced a model of consistency. Indeed, it is a fair summary to observe that the "strict construction" of these indemnity contracts evinces their strong disfavor by the courts. So much so, in fact, that *Alabama Great Southern Railroad Co. v. Sumter Plywood Corps.*, 359 So. 2d 1130 (Ala. 1978), sought to carve out only a narrow field of operation for such contracts.

I agree with the holding of *Alabama Great Southern* but the dictum that distinguishes between private and public covenants, in my opinion, is unsupported by any defensible rationale. There is however, a perfectly good reason for another and different distinction-the distinction between those classes of cases rquiring indemnity for vicariously imposed liability and those which covenant against one's own negligence. I would hold the latter void as against public

policy, consistent with our holding in *Alabama Great Southern Railroad Co. v. Sumter Plywood Corp.;* and I would validate the former, because, in respondeat superior cases, the policy considerations applicable to the latter classification are not present.

Our time-tested, fault-based tort law is being weakened unnecessarily by permitting, for example, a general contractor to impose upon a subcontractor the latter's obligation to indemnify the former for losses incurred through the former's own acts of negligence. I have never understood, nor accepted as sound law, such an exception to the general law of torts which fixes responsibility upon the wrongdoer. The promotion of safety—one of the objects of tort law is hardly the end result of such contracts in nonvicarious fault situations.

On the other hand, the law should look with favor upon contracts of indemnity where the liability insured against is imposed vicariously through the master/servant or principal/agent relationship. In these situations, tort law concepts are being implemented to the fullest. That is, where the principal's liability is imposed pursuant to the respondeat superior concept, tort law affords him a remedy for reimbursement against his wrongdoer servant or agent. to contractually obligate the servant, agent or employee, whose prospective negligent conduct may impose vicarious liability upon his principal, to indemnify his principal for any losses thereby incurred is consistent with the public policy of this State.

Here, the indemnity contract between the subject parties does not fall within the latter classification and, in my opinion, should be held void as against public policy. Therefore, I respectfully dissent as to Part II of the opinion.

Faulkner and Embry, JJ., concur.

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 22 day of Aug. 1980

/s/ J. O. Sentell
Clerk, Supreme Court of Alabama

APPENDIX B

MAILING ADDRESS:
P. O. BOX 187
MONTGOMERY, ALABAMA 36101

TELEPHONE: 832-6480

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

September 26, 1980

Re: 78-401 & 78-462

78-401 Courtaulds North America, Inc. vs. Industrial Tile, Inc., a corp.
78-462 Industrial Tile, Inc., a corp. vs. John Stewart and United States Fidelity and Guaranty Co., a corp.
Appellant Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

——— Appeal docketed. Future correspondence should refer to the above number.

——— Court Reporter granted additional time to file reporter's transcript to and including

——— Clerk/Register granted additional time to file clerk's record/record on appeal to and including

——— Appell . . . . granted 7 additional days to file briefs to and including

——— Appellant(s) granted 7 additional days to file reply briefs to and including

——— Record on Appeal filed

——— Appendix Filed

——— Submitted on Briefs

——— Petition for Writ of Certiorari denied. No opinion.

XXXX Application for rehearing overruled. No opinion written on rehearing.

——— Permission to file amicus curiae briefs granted

———

Clerk, Supreme Court of Alabama

APPENDIX C

MAILING ADDRESS:
P. O. BOX 197
MONTGOMERY, ALABAMA 36101

TELEPHONE: 832-6480

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

Re: 78-401 COURTAULDS NORTH AMERICA, INC. V. INDUSTRIAL TILE, INC., a corp.
78-462 INDUSTRIAL TILE, INC., a corp. v. JOHN STEWART and UNITED STATES FIDELITY, ETC. AND GUARANTY COMPANY, a corp.

_____ vs. _____
Appellant Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

_____ Appeal docketed. Future correspondence should refer to the above number.

_____ Court Reporter granted additional time to file reporter's transcript to and including

_____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including

_____ Appell_____ granted 7 additional days to file briefs to and including

_____ Appellant(s) granted 7 additional days to file reply briefs to and including

_____ Record on Appeal filed

_____ Appendix Filed

_____ Submitted on Briefs

_____ Petition for Writ of Certiorari denied. No opinion.

_____ Application for rehearing overruled. No opinion written on rehearing.

_____ Permission to file amicus curiae briefs granted

XXXXXX 10/15/80 MOTION FOR STAY OF ISSUANCE OF CERTIFICATE OF JUDGMENT DENIED
TORBERT, C.J., FAULKNER, JONES, SHORES, BEATTY, JJ., CONCUR

J. DeSenlett
Clerk, Supreme Court of Alabama

APPENDIX D

AUGUST 22, 1980

THE STATE OF ALABAMA- - - - - - -JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

SPECIAL TERM 1980

78-462

INDUSTRIAL TILE, INC., A CORPORATION

VS. MOBILE CIRCUIT COURT #CV77-000586

JOHN STEWART AND UNITED STATES FIDELITY AND GUARANTY COMPANY, A CORPORATION

This cause having been duly argued and submitted, IT IS CONSIDERED, ORDERED AND ADJUDGED that the judgment of the circuit court be affirmed.

IT IS FURTHER ORDERED AND ADJUDGED that the appellant, Industrial Tile, Inc., a corporation, and Reliance Insurance Company, surety on the supersedeas bond, pay the amount of the judgment of the circuit court plus 10 percent damages and interest and the costs of appeal was provided by the Alabama Rules of Appellate Procedure. And it appearing that said parties have waived their rights of exemption under the laws of Alabama, IT IS ORDERED that execution issue accordingly.

OPINION BY SHORES, J.

TORBERT, C.J., MADDOX, ALMON AND BEATTY, JJ., CONCUR.

FAULKNER, JONES AND EMBRY, JJ., CONCUR IN PART AND DISSENT IN PART.

I, J.O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 16 day of Oct. 1980.

/s/J. O. Sentell

Clerk, Supreme Court of Alabama

Supreme Court, U. S.
FILED
DEC 2 1980
MICHAEL RODAK, JR., CLERK

No. 80-706

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

INDUSTRIAL TILE, INC., a corporation,
Petitioner,

versus

JOHN STEWART AND UNITED STATES FIDELITY & GUARANTY COMPANY, a corporation,
Respondents.

On Petition for Writ of Certiorari to
The Supreme Court of the State of Alabama

RESPONDENT JOHN STEWART'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is a state court's ruling regarding the admissibility of evidence of a violation of an OSHA regulation subject to review by the United States Supreme Court?

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No. 80-706

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

INDUSTRIAL TILE, INC., a corporation
Petitioner,

versus

JOHN STEWART AND UNITED STATES FIDELITY & GUARANTY COMPANY, a corporation,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Alabama

RESPONDENT JOHN STEWART'S BRIEF IN OPPOSITION

OPINION BELOW

Respondent adopts Petitioner's response in this regard.

JURISDICTION

This Court lacks jurisdiction of Petitioner's writ of certiorari.

STATUTES INVOLVED

Respondent adopts Petitioner's response in this regard.

STATEMENT OF THE CASE

Respondent adopts Petitioner's response in this regard.

REASONS FOR DENYING THE WRIT

The question presented by Petitioner in the instant proceeding does not warrant review by this Court; the issues are not of sufficient import to merit this Court's attention. The Alabama Supreme Court carefully considered the issues raised by Petitioner herein and decided them correctly, applying basic principles of Alabama evidentiary law. Furthermore, Petitioner does not present a federal question as required by 28 U.S.C. §1257(3). In any event, Petitioner is precluded from raising a federal question at this juncture since it was not raised in any prior proceedings. Petitioner, following denials for a stay of the judgment by the Alabama Supreme Court and this Court, now improvidently requests that this Court review evidentiary rulings made pursuant to long-established Alabama precedent.

The initial defect in Petitioner's position is the lack of a federal question. The issue presented by Petitioner may be summarized quite succinctly as follows: Does a state court's ruling regarding the admissibility of evidence of a violation of an OSHA regulation present a federal question? Petitioner cites no authority in support of an affirmative answer to this question; none exists.

Assuming *arguendo* that the lower court's evidentiary ruling presents a federal question as defined in 28 U.S.C. §1257(3), Petitioner is precluded from raising it for the first time in a petition for certiorari. Petitioner has not heretofore cast his evidentiary objections in the cloak of a federal question; he may not now do so. Petitioner's objection to questions regarding its violation of an OSHA regulation was founded on the premise that such evidence was "inadmissible, incompetent, irrelevant [and] immaterial . . . [and] prejudicial . . . ." At no previous time has Petitioner asserted that the lower court's evidentiary ruling presented a federal question; accordingly, Petitioner's belated attempt to create a federal question in order to comply with the statutory requirements for certiorari is inappropriate. *See, e.g., Wilson v. Cook*, 327 U.S. 474 (1946); *Whitney v. People of State of California*, 274 U.S. 357 (1927).

Petitioner urges that the language of 29 U.S.C. §653(b)(4) precludes a state court from hearing evidence of OSHA violations. The statutory provision in question provides as follows:

> Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment. OSHA §4(b)(4), 29 U.S.C. §653(b)(4) (1970).

Petitioner states in Brief that the Alabama Supreme Court's consideration of the OSHA violation (and subsequent payment of the fine by Industrial Tile without contest) violates section 653(b)(4) since the admissibility of such evidence " 'affect[s]' the 'common law' or 'liabilities' of employers and employees". Petitioner's Brief for Certiorari at 6. An examination of pertinent case law indicates that this section simply means that no independent cause of action is created under OSHA.

Since the passage of OSHA in 1970, numerous plaintiffs have maintained that OSHA creates a federal cause of action for an injured party. The courts, apparently uniformly rejecting this argument, have consistently relied on section 653(b)(4) to opine that Congress did not intend to create a new remedy. As the Fifth Circuit noted in *Jeter v. St. Regis Paper Co.*, 507 F.2d 973 (5th Cir. 1975):

> The only provision in the statute which addresses itself to a private remedy clearly indi-

> cates that Congress did not intend OSHA to create a new action for damages in favor of employers. Section 653(b)(4) provides that . . . [statutory language omitted]. It seems clear that Congress did not intend OSHA to create a new private cause of action, but, on the contrary, intended private rights to be unaffected thereby.

Id. at 976-77. *See Russell v. Bartley*, 494 F.2d 344 (6th Cir. 1974) (a private civil remedy is precluded by the express terms of section 653(b)(4)); *Skidmore v. Travelers Insurance Co.*, 483 F.2d 67 (1973); *Fawvor v. Texaco, Inc.*, 387 F.Supp. 626 (E.D. Tex. 1975), *rev'd on other grounds*, 546 F.2d 636 (5th Cir. 1977) (section 653(b)(4) operates as a "statutory roadblock" to plaintiffs asserting that OSHA creates a federal cause of action); *National Marine Service, Inc. v. Gulf Oil Co.*, 433 F.Supp. 913 (E.D. La. 1977); Comment, *OSHA and the Private Litigant*, 30 Ala. L. Rev. 20 (1978) ("Federal courts have had several occasions to consider the implication of a private cause of action from OSHA . . . . The determinative provision of the Act in all these OSHA cases has been section 4(b)(4)").

Although the preceding discussion is by no means exhaustive, it adequately illustrates that Petitioner's reliance on section 653(4)(b)(4) is inappropriate. The suggestion that this section in some way limits the evidence that a court may consider in negligence actions is groundless. Furthermore, if OSHA does not vest inde-

pendent jurisdiction in the federal courts under 28 U.S.C. §1331, the use of OSHA regulations as evidence does not constitute a federal question.

It is widely accepted that both OSHA standards and evidence that they have been violated are admissible; courts have considered such evidence to be relevant in establishing a reasonable standard of care. The evidentiary use of OSHA violations has been approved by both courts and commentators. In approving this evidentiary use of OSHA, the courts have drawn a distinction between the creation of a private remedy under OSHA and the admissibility of OSHA regulations; petitioner does not recognize this distinction in Brief. The restrictions contained in the Act that arguably prohibit the creation of a cause of action do not operate to exclude evidence of OSHA violations. As one commentator has noted:

> If OSHA standards were introduced as evidence of negligence it should not violate the prohibition against the extension of rights or liabilities of parties affected by the Act. In other words, this approach is not contrary to the intent of section 4(b)(4) . . . . The jury is asked only to *consider* the regulation in reaching its conclusion.

Comment, *supra*, at 43-4. *See also* Hollis & Howell, *The Occupational Safety and Health Act: Potential Civil Remedies*, 10 Forum 999, 1013 (1975).

The courts have agreed with the reasoning above and have generally allowed evidence of OSHA violations. As the court noted in *Buhler v. Marriott Hotels, Inc.*, 390 F.Supp. 999 (E.D. La. 1974):

> The plaintiff may, of course, use OSHA standards and evidence that they have been violated as evidence of negligence at trial, to the extent they would be admissible for that purpose under the rules of evidence. . . .

Id. at 1000. *See Davis v. Portland General Electric Co.*, 286 Or. 195, 593 P.2d 1135 (1979); *Kelley v. Howard S. Wright Construction Co.*, 90 Wash.2d 323, 582 P.2d 500 (1978); *Koll v. Manatt's Transportation Co.*, 253 N.W.2d 265 (Ia. 1977); *Disabatino Brothers, Inc. v. Baio*, 366 A.2d 508 (Del. 1976); *Dunn v. Brimer*, 259 Ark. 855, 537 S.W.2d 164 (1976).

None of the cases cited by Petitioner in Brief at page 12 hold that the admissibility of OSHA violations enlarges the substantive law of a state.[1] At least two of the cases cited by Petitioner hold that evidence of the

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1 One of the cases cited by Petitioner, *Otto v. Specialties, Inc.*, 386 F.Supp. 1240 (N.D. Miss. 1974) is apparently the only case that has held OSHA regulations inadmissible. An examination of the Mississippi decision indicates that the court inappropriately juxtoposed negligence per se principles to questions regarding the evidentiary use of OSHA. As one commentator has noted, "In that decision . . . the court not only confused negligence per se principles with the subject matter of other OSHA cases, it also failed to recognize any distinction between negligence per se and the evidentiary use of OSHA regulations." Comment, *supra*, at 42.

violation of OSHA regulations constitutes negligence per se. The Iowa Supreme Court ruled in 1977 that a "violation by an employer of an OSHA or IOSHA standard [the comparable state statute] is *negligence per se* as to his employee. Such a violation is *evidence of negligence* as to all persons who are likely to be exposed to injury as a result of the violation." *Koll v. Manatt's Transportation Co.*, 253 N.W.2d 265, 270 (Ia. 1977). A similar result was reached in the *Kelley* case. The Washington Supreme Court, initially noting that OSHA regulations are relevant to the appropriate standard of care, held that "violation of the regulation would be negligence per se." 90 Wash.2d 323, ____, 582 P.2d 500, 508.

The Alabama Supreme Court has also expressly held that evidence of OSHA violations is admissible to establish the proper standard of care in a negligence case. In *Knight v. Burns, Kirkley & Williams Construction Co.*, 331 So.2d 651 (Ala. 1976), the Alabama Supreme Court ruled that while OSHA does not create a private cause of action, "this does not mean that appropriate and relevant standards and safety requirements established by OSHA or accompanying regulations are completely and totally irrelevant." *Id.* at 654. The Alabama court relied on a long-established state evidentiary law in reaching its conclusion in *Knight*.

The Alabama Supreme Court ruled in 1857 that medical treatises are admissible in evidence under certain circumstances. The court in *Stoudenmeier v. Williamson*, 29 Ala. 558 (1857), noted the following:

> We think that medical authors, whose books are admitted or proven to be standard works with that profession, ought to be received in evidence. Should such works be obscure to the uninitiated, or should they contain technicalities, or phrases not understood by the common public, proper explanation should be offered, lest the jury be thereby misled.

Id. at 567.

As noted in the excerpt above, the court in *Stoudenmeier* provided a means by which the admissibility of such evidence could be controlled and limited.

In *City of Dothan v. Hardy*, 237 Ala. 603, 188 So. 264 (1939), the Alabama Supreme Court, analogizing the evidentiary nature of medical treatises to safety codes, ruled that safety codes are admissible in Alabama. Acknowledging the nature of the rule announced in *Stoudenmeier*, the court in *Hardy* concluded that "[w]e have not found the ends of justice defeated by our rule, nor the difficulties of its applications very great." *Id.* at 266-67. Furthermore, the court in *Hardy* reiterated the limitations placed upon the admissibility of this type of evidence and concluded that the safety codes were properly admitted.

In the instant case the Alabama Supreme Court considered its prior holdings in *Hardy* and *Knight* and ruled in the following manner:

> If the regulations are admissible as going to show a standard of care, then it seems only reasonable that evidence of violation of the standards would also be admissible as evidence that the defendant failed to meet the standards that it should have followed. Clearly, the fact that Industrial Tile had been cited by OSHA for violating the standards, and the fact that Industrial Tile has paid the fine, are relevant to the question of whether it violated the standard of care applicable to its conduct.

Industrial Tile, Inc. v. John Stewart and United States Fidelity and Guaranty Co., 388 So.2d 171 (Ala. 1980).

Furthermore, the court below, as required by *Stoudenmeier* and its progeny, insured that the jury understood the impact of the evidence. The record indicates that the court instructed the jury as follows:

> [The evidence regarding the regulations is admissible] not as the absolute rule for you to follow but this is a guideline of rules and regulations, one of the guidelines of the rules and regulations to be followed in the trade or business Industrial Tile is involved in.
>
> [T]his is not the ultimate decision for you to decide, but you consider this with all of the facts that you hear in this case.

Id. at 173.

It is clear that the Alabama Supreme Court did no more than apply a well-tested and long-established principle of Alabama law in determining that the evidence was properly admitted.[2] As noted by the court, there was no error to reverse, "particularly in light of the admonition given the jury by the trial judge that it was not to consider the rules and regulations as an absolute, but merely as guidelines and that they were to be considered along with all the other facts addressed in the case." *Id.* at 174.

A review of the court record indicates that Industrial Tile was in no way prejudiced by the admission of the evidence in question. Petitioner notes in Brief that "[if] the decision . . . is allowed to stand then the inevitable result will require employers to contest every citation or fine rather than expose itself to large personal injury judgments such as has been experienced in this case."

Notwithstanding the fact that the court did not rely exclusively on the OSHA regulations to establish In-

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2 Petitioner attaches unwarranted emphasis to the fact that the evidence was admitted by the court below as a "declaration against interest." Whether the evidence is properly viewed as such and whether the *Motley* and *Ritter* cases operate as authority in this situation is inconsequential at this juncture. The record clearly reflects that the Alabama Supreme Court admitted the evidence under long-standing authority because it was relevant to the issue before the court.

dustrial Tile's negligence,[3] Petitioner's position is simply not borne out by the record. The officer of Industrial Tile who testified concerning the OSHA violation, Mr. Savell, was given ample opportunity to explain the circumstances surrounding the citation issued against Industrial Tile. The following excerpt from the transcript is instructive in this regard:

> Q Now, Mr. Savell, OSHA people cited Industrial Tile the day of this accident for violation of the 10-foot rule, isn't that correct?
>
> MR. SMITH: Your Honor, I would like to renew my objection to this question of counsel on the grounds that it is inadmissible, incompetent, irrelevant and immaterial as to any of these matters that OSHA undertook in administrative proceedings, would be prejudicial and again renew our request for a mistrial.
>
> THE COURT: Overruled. Overruled and denied. Now, ladies and gentlemen of the jury, I'm allowing him to ask this question, but I would tell you that this is not the ultimate decision for you to decide, but you consider this in connection with all the facts that you hear in this case. Okay. You may answer.

---

3 The record clearly indicates that the OSHA violation was not the only evidence of Industrial Tile's negligence; the court notes that "[t]here was evidence from a number of witnesses that the crane violated the ten-foot standard." 388 So.2d at 174.

A They did fine us. The officer told me it was an automatic fine, that any time a man was involved in such as . . .

Q And wasn't that concerning this very paragraph 1926.550(a) . . .?

THE COURT: If you know.

Q . . . 15(i)?

MR. SMITH: We would like a continuing objection and renew our motion on each question asked by counsel along this line.

THE COURT: You have it.

Q Isn't that the very paragraph that calls for a 10-foot clearance?

A Which one is it now?

Q Paragraph 1926.550(a) 15(i)?

A If this was under that particular . . . (inaudible)

Q Industrial Tile was given notification of that, isn't that correct, or that proposed fine?

A That's correct.

Q An opportunity to contest that citation or fine? Isn't that correct?

A I think we had an opportunity to contest it, but . . .

Q Did Industrial . . . ?

MR. SMITH: Let him finish his answer.

Q I'm sorry, go ahead.

A We didn't contest it for the reason that I didn't think it would even do any good, it would be a waste of time.

Q Didn't even write a letter?

A There wasn't much sense to it because I felt like it would be a waste of time. He said it was an automatic fine, anyway. We did rig it to go lower.

MR. SMITH: I didn't hear the last statement.

THE COURT: We did rig it to go lower.

MR. ATCHISON: Did rig it to go lower?

A Yes, it was.

The preceding dialogue illustrates that Industrial Tile's position was in no way compromised by allowing evidence that Industrial Tile had paid the fine without contesting it. The "inevitable result" hypothesized by Petitioner is not supported by the record in the instant case. The only "inevitable result" under Petitioner's method of analysis is that whenever a court makes an evidentiary ruling regarding a federal law, that ruling will be subject to review by the United States Supreme Court. Such a result is neither appropriate nor desired.

CONCLUSION

Petitioner's writ is appropriately denied for the following reasons:

(1) Petitioner does not present a federal question as required by 28 U.S.C. §1257(3);

(2) Petitioner's attempt to raise a federal question at this juncture is untimely and therefore precluded;

(3) Petitioner requests that this Court do no more than review an evidentiary ruling made by the Alabama Supreme Court in accordance with a long line of precedential authority;

(4) Petitioner's position at trial was in no way compromised by the admissibility of the OSHA violations; and,

(5) The conclusion reached by the court below was proper in all respects and, furthermore, was fair to the respective parties.

WHEREFORE, Respondent respectfully requests that Petitioner's writ of certiorari be denied.

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CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the foregoing Brief of Respondent, John Stewart in Opposition to Petition for Writ of Certiorari to the Supreme Court of Alabama, by depositing same, postage prepaid, in the U.S. mails, addressed to:

James Atchison
P.O. Box 1706
Mobile, AL 36601

I further certify that all parties required to be served, have been served.

This ____ day of December, 1980.

JAMES H. LACKEY

Supreme Court, U. S.
FILED
DEC 10 1980
MICHAEL RODAK, JR., CLERK

NO. 80-706

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

INDUSTRIAL TILE, INC., a corporation,

Petitioner,

versus

JOHN STEWART AND UNITED STATES FIDELITY & GUARANTY COMPANY, a corporation,

Respondents.

REPLY TO THE RESPONDENT JOHN STEWART'S BRIEF IN OPPOSITION

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REASONS FOR GRANTING THE WRIT AND REPLY TO ARGUMENTS FIRST RAISED IN RESPONDENT'S BRIEF IN OPPOSITION

John Stewart, in his Brief in Opposition to the Petition on Page 2 of the Brief states:

"Furthermore, Petitioner does not present a federal question as required by 28 U.S.C. §1257(3). In any

event, Petitioner is precluded from raising a federal question at this juncture since it was not raised in any prior proceedings."

This is contrary to the clear facts of this case. The objection made at the trial court, while sufficiently broad, specifically points out that the testimony offered concerning the voluntary payment of the fine and the citation issued by OSHA was inadmissible ". . .as to any of these matters that OSHA undertook in administrative proceedings,. . ." See Page 12 of Brief in Opposition.

The preemption issue was also presented by way of Brief to the Supreme Court of Alabama. On Page 16 of the Brief and argument of Appellant, Industrial Tile, the following is contained:

> "Additionally, the Supreme Court of Alabama has mentioned another reason as to why the courts of this State should be very careful in not allowing the regulations under OSHA to have the effect of law in civil proceedings. The reason is in the Act itself. The Legislature of the United States was aware of the problems that might be involved in civil litigation in state courts. The following is found in 29 U.S.C., §653(b)(4):
>
> > '*Nothing* in this chapter shall be construed to supersede or in *any manner* affect any workmen's compensation law or diminish or *affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries,* diseases, or death of employees arising out of, or in the course of, employment' (emphasis supplied)
>
> The admission into evidence in a state civil action of a citation and the assessment of a penalty and the non-contest of that penalty under the 'chapter' referred to above could not help but affect the common law or

> statutes of the State of Alabama under which John Stewart's civil case was brought. The introduction into evidence of the fining capacity of the OSHA representative lends to the citation an official aura far more complex than was ever contemplated by the authors of the Act and its admission into a civil case in the State of Alabama transgresses upon the prohibition of the Legislature of the United States in attempting to limit the scope of the regulations issued under OSHA." Pages 16-17 Brief and argument of Appellant, Industrial Tile in the Supreme Court of Alabama

John Stewart takes the position that the question of preemption is not a federal question and should not be decided by this Court. On that issue this Court has spoken many times. *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941); *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 12, 230 (1947); *Huron Portland Cement Company v. City of Detroit,* 362 U.S. 440, 443 (1960); *Florida Lime & Avocado Growers Inc. v. Paul,* 373 U.S. 132, 142 (1963); *New York Department of Social Services v. Dublino,* 413 U.S. 405, 413 (1972); *DeCana, et. al. v. Bica,* 424 U.S. 351, 356 (1976); *Ray v. Atlantic Richfield Company,* 435 U.S. 151 (1977).

Stewart also claims that Industrial Tile "attaches unwarranted emphasis to the fact that the evidence was admitted by the court below as a 'declaration against interest' ". See footnote number 2, Page 11, Brief in Opposition. If the Act of Congress explicitly states by its terms that:

> "Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or diminish or *affect* in any other manner the common law or statutory rights, duties, *or liabilities* of employers and employees under *any law* with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment." (emphasis supplied)

then why is the citation, fine, and voluntary payment of the fine admissible as a "declaration against interest" where no interest of the employer can be affected. Since the federal statute says the rights and liabilities of employers cannot be affected by OSHA there can be no "declaration against interest". In *Jeter v. St. Regis Paper Company,* 507 F.2d 973 (5th Cir. 1975 Miss.) the 5th Circuit Court of Appeals stated:

> "Although the facts here do not call upon us to decide definitively whether OSHA may create a private right of action by an employee against his employer, we perceive no basis upon which to posit a claim on behalf of Jeter, a non-employee, against St. Regis. St. Regis owes no duty to Jeter under OSHA. There being no duty, there can be no breach. The district court was correct in not submitting this theory of action to the jury."

In essence, there being no interest that can be affected by compliance or noncompliance with OSHA as to the liabilities of an employer, there can be no "declaration against interest" and the Supreme Court of Alabama and the trial court sitting in Alabama improperly allowed the evidence in

light of the federal statute preempting this area.

For the above reasons, the Petition should be granted and the decision of the Alabama Supreme Court concerning Industrial Tile reversed and remanded for a new trial.

Respectfully submitted,

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